Supreme Court, U.S.
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No. 99-1723

IN THE

Supreme Court of the United States

KLAMATH DRAINAGE DISTRICT; KLAMATH WATER USERS PROTECTIVE ASSOCIATION; SAM HENZEL; HENZEL PROPERTIES, LTD.,

Petitioners,

v.

ROGER PATTERSON; KARL E. WIRKUS; ELUID MARTINEZ; PATRICIA BENEKE; BRUCE BABBITT; UNITED STATES BUREAU OF RECLAMATION; UNITED STATES OF AMERICA; PACIFICORP; YUROK TRIBE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT YUROK TRIBE

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QUESTION PRESENTED

Whether the court of appeals departed from the usual and accepted course of judicial proceedings by resolving tribal water rights issues presented in litigation challenging the 1997 Operations Plan of the Bureau of Reclamation for the Klamath Irrigation Project, which plan determined that water should be made available to Klamath Basin Indian Tribes in compliance with federal legal obligations.

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STATEMENT OF THE CASE

Petitioners' Statement of the Case is incomplete in several respects and misleading in others. Those relevant aspects of the case either omitted or mischaracterized by Petitioners are discussed below.

Respondent Yurok Tribe, intervenor below, is a federally-recognized Indian tribe that resides on a reservation straddling the Klamath River a mile on each side for the last 45 miles as it makes its way to the Pacific Ocean. For centuries the Yurok Tribe has relied on the Klamath River for its subsistence, cultural and religious needs. The Tribe intervened on the side of the federal defendants and PacifiCorp, based on the Tribe's well-founded belief that diversions from the Klamath Project are depleting water from the Klamath River that would otherwise be available for the Tribe's anadromous fishery. The Project also has demonstrable effects on the quality of water and habitat on which fish depend. SER 89 ("Instream Flow Requirements for Tribal Trust Species in the Klamath River," prepared by Trihey & Associates, March, 1996). Because this litigation raised important issues concerning the Bureau of Reclamation's (hereafter "Reclamation") operation of the Klamath Irrigation Project, the Tribe participated in every stage of the case.

The Yurok Tribe maintained throughout this litigation that Reclamation has a legal duty to operate the Klamath Project to make water available in compliance with federal obligations to satisfy tribal water rights. The Tribe raised these issues at the earliest opportunity, fully briefed them at each stage of the case and responded to petitioners' arguments in opposition to the Tribe's interests. To support

its arguments, the Tribe submitted into evidence the report of a hydraulic engineer who quantified instream flows required to sustain healthy fish habitat in the Klamath River and the report of an hydrologist who assessed the effect of the Klamath Project on instream flows and fishery habitat in the Klamath Basin. SER 78-134; SER 135-224 (Trihey & Associates, "Instream Flow Requirements for Tribal Trust Species in the Klamath River," March, 1996; Barry Hecht and Gregory Kamman, "Initial Assessment of Pre- and Post-Klamath Project Hydrology on the Klamath River and Impacts of the Project on Instream Flows and Fishery Habitat," March, 1996). These reports, which were not controverted by the petitioners, formed the factual basis of the Yurok Tribe's opposition to the arguments of the petitioners that Reclamation lacked the legal authority and duty to operate the Klamath Project to satisfy tribal water and fishing rights. From the beginning of the case, petitioners were on notice that tribal water rights and the authority of Reclamation to protect such rights were part of this case.

The history of the Yurok Tribe's relationship to and dependence on the Klamath River must be appreciated in order to understand the scope of this case. For centuries and long before the arrival of Europeans, the Yurok Tribe has relied on water from the Klamath River to support its tribal salmon fishery, culture and economy. The courts have recognized that the Yurok Tribe has used water in the Klamath River for fishing and other purposes "long before the white man came," and such rights "were not much less necessary to the existence of the Indians than the atmosphere they breathed." *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981). Based on the Yurok Tribe's ancient usage of the Klamath River and the purpose for which the Tribe's Reservation was created in 1855, the courts have held that

the Yurok Tribe has federally-protected fishing rights in the waters of the Klamath River. *Parravano v. Masten*, 70 F.3d 539, 546 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996). Because the instant case practically and legally affects the amount of water available in the Klamath River for the use of the Yurok Tribe — water essential for the Tribe's fishing way of life — the Yurok Tribe intervened in support of Reclamation's authority and duties to satisfy tribal water and fishing rights.

A. Petitioners' request has been uniformly rejected by the lower court.

With respect to the proceedings below, petitioners' Statement of the Case neglects to note that except for the amendment of the Opinion, the Court of Appeals denied both the petition for panel rehearing and the petition for rehearing en banc. Thus, not a single judge of the court of appeals believed that the arguments petitioners advance in this Court were sufficiently meritorious to warrant consideration by the court en banc. As the amended opinion notes, "[t]he full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing." Pet. App. at 2a.

B. Petitioners mischaracterize the nature of the water rights at issue.

Petitioners misrepresent the relative legal gravity of their water rights as compared with the rights of Indian tribes in the Klamath Basin. In the Klamath Basin there has not yet been an adjudication of *anyone's* rights, so petitioners' water rights are no more adjudicated than the rights of the tribes. Yet petitioners consistently refer to their own water rights

as "vested" or "statutorily recognized," while at the same time denigrating tribal rights as "unadjudicated." Pet. at 3, n.2 and 14. Petitioners imply that their own asserted water rights can be vindicated now, in this case, while any recognition of tribal water rights must await some future adjudication. By this mischaracterization, petitioners ask this Court (as they asked the lower courts) to give petitioners a free hand to argue against federal recognition of tribal rights, while forbidding any consideration of the positive, established federal obligation to respect tribal water rights.

C. Petitioners mischaracterize the effect of Reclamation's 1997 Operations Plan.

Petitioners suggest that the amounts of water dedicated by Reclamation to tribal and Endangered Species Act purposes are "high." Pet. at 6. This is a very subjective characterization. Although the amounts are indeed higher than Reclamation has often provided in the past, they are by no means higher than the amounts historically enjoyed by the tribes for fishing and hunting purposes.

D. The United States does not agree that its obligations to Indian tribes play no role in this case.

Despite the incontrovertible nexus between petitioners' claims under the 1956 contract and the tribal water claims, petitioners suggest that the United States agreed that the issues of tribal water rights and the authority of Reclamation to satisfy such rights are beyond the scope of matters raised by the complaint and amended counterclaim. Pet. at 9. To the contrary, the United States recognized that petitioners' assertion of rights to additional water under the 1956 contract directly implicated the authority of Reclamation to satisfy

tribal water rights. U.S. Br. at 17 ("The assumption underlying the Irrigators' appeal is that they are somehow entitled to prevent the Bureau, in complying with the Endangered Species Act or *its responsibilities to Klamath Basin Indian Tribes*, from reducing water supplies below those levels necessary to meet their own needs." [emphasis added]). In the court of appeals, the United States characterized the responsibility of Reclamation to manage Link River Dam in compliance with the Endangered Species Act as "wholly relevant to the issue at hand," and argued that "[a] similar point applies to the United States' trust responsibilities to the Klamath Basin Indian Tribes, who hold water rights with priority dates ranging from time immemorial to the nineteenth century." U.S. Br. at 54-55.

E. The relief sought by the amended counterclaim is broader than articulated by petitioners.

Petitioners also mischaracterize the scope of relief sought by the amended counterclaim. The amended counterclaim did not seek only a "declaration of petitioners' rights arising under the 1956 contract." Pet. at 9. Rather, the counterclaim also sought a declaration that PacifiCorp was not liable under the 1956 contract for carrying out the decisions of Reclamation in allocating water under the 1997 operations plan for the Klamath Project, which indisputably included allocation of water for instream uses of the intervenor Yurok Tribe.

REASONS FOR DENYING THE WRIT

Petitioners aim a surgeon's knife at the opinion of the court of appeals, asking this Court to exercise its summary disposition authority to excise three paragraphs of the opinion that confirm the settled authority — indeed the obligation — of Reclamation to operate its Klamath Project consistently with federal obligations to Indian tribes. Petitioners' hyper-technical dissection of the issues in this case cannot obscure the fundamental fact that the authority of Reclamation to so operate its Project is an inescapable element of any consideration of the issues raised by the complaint and amended counterclaim. It is telling that petitioners do not seek review of the court of appeals' decision that they are not third-party beneficiaries of the 1956 contract, that the 1956 contract can be amended without their consent, that Reclamation owns and has control over Link River Dam, that Reclamation must exercise that authority to comply with the Endangered Species Act, and that PacifiCorp is immune from suit by petitioners for implementing Reclamation's 1997 operations plan for the Klamath Project. Petitioners have offered no principled rationale for treating the court of appeals' disposition of the tribal water rights issues in isolation from these other issues. This omission is especially glaring in light of the fact that, as explained below, such issues are inextricably bound up with the other issues in the case.

Moreover, if these issues are as important as petitioners claim, summary disposition by this Court is not the appropriate means to resolve them. Rather, the proper means to obtain such review would be a petition for certiorari, with full briefing and argument upon the determination by this Court that the petition raises issues warranting this Court's

review. This Court should reject petitioners' unorthodox attempt to sever from this case those tribal water rights issues that have been litigated for over three years. The court of appeals properly addressed these issues and correctly applied the governing law. The petition for writ of certiorari should be denied.

I. The Authority and Obligation of the Bureau of Reclamation to Operate the Klamath Irrigation Project to Fulfill the United States' Trust Obligation to the Yurok Tribe Was Within the Scope of the Issues Raised by this Case, and the Court's Resolution of That Issue Does Not Depart from the Usual and Accepted Course of Judicial Proceedings.

It is undisputed that this litigation began as a challenge to Reclamation's 1997 interim Operations Plan for the Klamath Project. Petitioners brought suit because they objected to an amendment of the 1956 contract between the United States and PacifiCorp which implemented the water allocation decisions contained in the 1997 Operations Plan. Consistent with its legal obligations to satisfy senior tribal water rights, Reclamation in the 1997 Operations Plan specifically allocated water for Klamath River flows for the beneficial use of the Yurok Tribe as well as other tribes. As the Petitioners characterize it, the Plan "would first allocate fixed quantities of water to high instream Klamath River flows and high Upper Klamath Lake levels, and leave to the Klamath Project Irrigators [petitioners here] only the water left over after these requirements were met." Pet. at 6.

Petitioners thus brought this suit in part to protect themselves against Reclamation's decisions to fulfill its legal obligations to satisfy senior tribal water rights. Thus, while petitioners argued that they have rights to additional water

as third party beneficiaries of the 1956 contract, they also argued that PacifiCorp cannot carry out the 1997 Operations Plan if such implementation resulted in less water for the petitioners.

Petitioners' arguments in this litigation have been entirely consistent with that objective. Petitioners have contended throughout that their rights under the 1956 contract meant that Reclamation had no legal authority to order PacifiCorp to operate Link River Dam to give a higher priority to any use other than irrigation. This argument directly implicates tribal water rights in much the same way Reclamation's duties under the Endangered Species Act are implicated.[1]

Thus, a key issue in this case is the authority of Reclamation to operate Link River Dam in a manner to satisfy federal legal responsibilities, such as the Endangered Species Act and the United States' trust obligations to the Klamath Basin Tribes. The Yurok Tribe, as intervenor on the side of the federal defendants and PacifiCorp, maintained at every stage of this case that the duties of Reclamation to operate Link River Dam included the obligation to satisfy tribal water rights associated with reserved fishing rights, pursuant to federal obligations under the settled doctrine of the trust responsibility for Indian resources. *See United States v.*

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1. It is noteworthy that petitioners have not sought review of the court of appeals ruling that Reclamation must exercise its authority over Link River Dam in compliance with its legal responsibilities under the Endangered Species Act. For purposes of Reclamation's duties to operate Link River Dam, there is no principled distinction between its ESA responsibilities and its responsibilities to satisfy tribal water rights pursuant to the federal trust obligation.

Adair, 723 F.2d 1394, 1408-11 (9th Cir. 1983). The district court agreed with this contention, and the court of appeals affirmed the correctness of the scope of Reclamation's duty, both in the original panel decision and in the amended opinion on rehearing. Pet. App. at 12a-13a, 2a. It is a distortion of the record to suggest — now that petitioners' arguments in this regard have been thoroughly considered and rejected — that this issue was not properly raised.

A review of the record shows that the issue of Reclamation's authority to satisfy tribal water rights was not only raised, it was vigorously contested and litigated throughout this case. In a number of ways, petitioners' complaint directly implicated Reclamation's authority to operate the Project to comply with tribal water rights. The complaint alleged that Reclamation has determined to operate the project for "maintenance of specific flows in Klamath River and water surface elevations in Upper Klamath Lake," a reference to Reclamation's decision in the 1997 Operations Plan to comply with tribal instream flow and Lake level demands. ER 13. The complaint further alleged that such determinations would adversely affect the quantity of water available for irrigation. It is disingenuous of petitioners to have demanded that water be reallocated away from those River and Lake needs, and now allege that the courts have erred in considering those original allocations required by federal law for tribal needs.

The dismissal of petitioners' claims without prejudice, whether voluntarily or by order of the district court, did not change the nature of the case or the scope of the issues raised. The amended counterclaim alleged that Reclamation had directed PacifiCorp to operate Link River Dam in a manner that ensures that water is made available "to meet the trust

responsibility of the Secretary of the Interior to federally-recognized Indian Tribes within the Klamath Basin." ER 99. To protect itself against the consequences of an operations plan that may provide less water than the irrigators had received the year before, PacifiCorp sought in the amended counterclaim a declaration that PacifiCorp was not liable to the irrigators "under the [1956] Contract for implementing Federal Defendant's operations plans for the Klamath Reclamation Project." ER 584. Because the 1997 plan indisputably allocated water for instream uses of the Yurok Tribe, the amended counterclaim raised the issue of the existence of tribal water rights and the authority of Reclamation to operate the Project consistently with such rights.

Upon filing of PacifiCorp's counterclaim, the Tribe again intervened to protect its interests in water and fish in the Klamath River. SER 300. Petitioners did not oppose the Yurok Tribe's intervention in the counterclaim, which they conceded raised the identical issues petitioners sought to have resolved in their first cause of action relating to their asserted rights under the 1956 contract. SER 270. In fact, they invited the participation of the Yurok Tribe as intervenor:

> Here, PacifiCorp's counterclaim is directed against plaintiffs [petitioners] only. It may be appropriate, and plaintiffs have no objection, if as a condition of the dismissal of plaintiffs' first cause of action, the federal defendants and intervenors are permitted to join as parties or intervenors with respect to the counterclaim.

Plaintiffs' Memorandum and Authorities in Support of Motion for Voluntary Dismissal Without Prejudice of

Plaintiffs' First Cause of Action at 5, SER 270. Having invited intervention, petitioners cannot now be heard to complain that the Yurok Tribe raised issues petitioners knew or should have known would be raised, and that the court of appeals resolved those issues.

II. The Court of Appeals' Decision Upholding the Bureau of Reclamation's Authority to Satisfy Federal Legal Obligations to Indian Tribes is Consistent with Existing Law of the Circuit and Does Not Depart from the Usual and Accepted Course of Judicial Proceedings.

Petitioners do not seek review of the conclusion of the court of appeals that Reclamation owns and has substantial control over Link River Dam. They argue instead that the court of appeals should not have reached the issue of whether that authority includes the responsibility to satisfy legal obligations to Indian tribes, primarily because this issue is a source of on-going disagreement between the United States and the State of Oregon. Although petitioners may disagree with the court's conclusion, nothing in the court's reasoning, treatment of applicable authority or conclusion calls for this Court's exercise of the extraordinary power of summary disposition. Petitioners do not explain, nor could they, how the court of appeals' reasoning and conclusion departs so far from the accepted course of judicial proceedings that summary disposition is warranted. Certainly the fact that there are disagreements between the federal government and the State of Oregon regarding the scope of Reclamation's authority, Pet. at 17-18, is not sufficient reason to strike the court of appeals' careful and considered determination of that issue. The court of appeals did nothing more than decide the issues presented to it.

The court of appeals' handling of this issue is fully consistent with governing law of the Ninth Circuit and the decisions of this Court. It has long been the law in the Ninth Circuit that federal agencies are obligated to operate their projects in a manner that complies with the priority of tribal water rights, even in the absence of a completed adjudication. *Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts v. United States*, 832 F.2d 1127, 1131 (9th Cir. 1987). In that case, the court of appeals upheld the duty of the Bureau of Indian Affairs (BIA) to protect the prior and paramount fishing water rights of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, even though there was then pending a state-wide water rights adjudication in the State of Montana. 832 F.2d at 1130, 1132. The irrigators in that case challenged the BIA's determination of instream flow levels and pool levels for the Tribes' fishery within the Flathead Irrigation Project. The court rejected the argument that the federal agency's determination and enforcement of tribal water rights should await the outcome of the state adjudication. The court noted the trust duty of the BIA to "accord potentially superior tribal fishing rights the protection that federal law gives them against claims and considerations of junior appropriators." 832 F.2d at 1131-1132. *See also Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032 (9th Cir. 1985), *cert. denied*, 474 U.S. 1032, 106 S. Ct. 593 (1985) (district court is not required to dismiss suit involving fishing and water rights of Yakima Nation in favor of a state court action generally adjudicating water rights in the Yakima River Basin).

Petitioners also argue that this Court's decision in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), should be interpreted as precluding

judicial and "presumably federal agenc[y]" determinations of water allocations until state water adjudications are completed. Pet. at 14-15. Petitioners ignore the point that the policy against federal court involvement in water rights issues is based on "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817. The Oregon general stream adjudication is in the early stages and is years away from any determination of claims and quantification of rights. This Court has expressly recognized that if "the federal suit is well enough along" its dismissal "would itself constitute a waste of judicial resources and [would be] an invitation to duplicative effort." *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 569 (1983). That is precisely the case here. The court of appeals' consideration and resolution of tribal water rights does not violate any federal policy with regard to state water adjudications. The court of appeals' amended opinion adequately addressed the concerns petitioners raised on their petition for rehearing.

The court of appeals' decision in the case under review confirms these legal principles. It does not conflict with any decision of any other circuit court of appeals. Even if the issue were worthy of this Court's review, the court of appeals' decision does not in any manner depart from the usual and accepted course of judicial proceedings. The request for summary disposition should be denied.

III. The Court of Appeals' Affirmation of the Existence of Tribal Water Rights in the Klamath Basin Does Not Depart From the Usual and Accepted Course of Judicial Proceedings.

Petitioners repeat here an argument that was rejected by the district court, twice rejected by the decision panel in the court of appeals and not a single judge voted to rehear these issues en banc.

Petitioners' principal complaint is that the court of appeals erroneously interpreted the scope of *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984). Even were petitioners correct (and they are not), the threshold question for this Court is whether an alleged error of this kind calls for an exercise of this Court's power of supervision. As Justice Stevens has emphasized, this Court's "certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases. . . ." *Watt v. Alaska*, 451 U.S. 259, 275, n.5 (1981) (Justice Stevens concurring). Petitioners have not identified any way in which the court of appeals' decision conflicts with the decision of any other circuit or any decision of this Court. Nor have they shown that the issue decided by the court of appeals is not, but should be, settled by this Court.

The court of appeals' reliance on *Adair* does not warrant an exercise of this Court's supervisory power. In *Adair*, the court of appeals applied well-settled principles of federal reserved Indian water rights to determine "the ordering [of] priority among reserved water rights arising under federal law" in the Klamath Basin. 723 F.2d at 1406 (distinguishing the determination of reserved rights and their priority from quantification, which was left for state court adjudication).

The court of appeals ruled that in the Treaty of 1864, the Klamath Tribes reserved a sufficient quantity of water to support their fishing and hunting rights. 723 F.2d at 1409. Because such rights had been exercised in Oregon and California for "thousands of years" in an ancestral homeland encompassing "some 12 million acres," the court ruled that the reserved water right has a senior priority date of first use or "time immemorial." 723 F.2d at 1412, 1413. The *Adair* court's conclusion is fully applicable to all the tribes in the Klamath Basin:

> Thus, we are compelled to conclude that where, as here, a tribe shows its aboriginal use of water to support a hunting and fishing lifestyle, and then enters into a treaty with the United States that reserves this aboriginal water use, the water right thereby established retains a priority date of first or immemorial use.

723 F.2d at 1414.

Although *Adair* focused on the water rights of the Klamath Tribes, the Ninth Circuit has followed and applied the principles of that decision in other cases, just as it did here. *See, e.g., Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts v. United States*, 832 F.2d 1127, 1131 (9th Cir. 1987) (the significance of *Adair* is that "when the Tribe exercised aboriginal title and rights to fish on the lands and waters in question before the reservation was created, the priority date of the reserved water right for fishery purposes is time immemorial.").

The fact that the Yurok Tribe was not a party in *Adair* does not render erroneous the court of appeals' reliance on that case as the basis for declaring the rights of the Klamath Basin Tribes. The principles on which the *Adair* Court based its decision apply with equal force to the water rights of the Yurok Tribe. The court of appeals has recognized that the Yurok Tribe has used water in the Klamath River for aboriginal fishing purposes since before the arrival of Europeans and before the reservation was created in 1855. *See Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (The Yurok Indians exercised fishing and hunting rights "long before the white man came," and such rights "were not much less necessary to the existence of the Indians than the atmosphere they breathed."); *Parravano v. Masten*, 70 F.3d 539, 542, 546 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996) (Yurok Tribe has used the Klamath River "for generations" for "traditional salmon fishing"). Based on the Yurok Tribe's ancient usage of the Klamath River and the purpose of the executive order creating the Yurok reservation, the Ninth Circuit in *Parravano* concluded that the Yurok Tribe has federally-protected fishing rights in the waters of the Klamath River. *Id.* at 546. Similar to the Klamath Tribes, the Yurok Tribe's reserved water right accompanies the fishing right derived from aboriginal usage and the executive order creating the reservation. *See, e.g., United States v. Adair*, 723 F.2d 1394, 1408 (9th Cir. 1983) (Klamaths' reservation created to preserve the right to fish included a reserved water right in the Tribes); *Joint Board of Control of Flathead, Mission and Jocko Irrigation Districts v. United States*, 832 F.2d 1127, 1131 (9th Cir. 1987) (treaty right to fish includes a water right sufficient to satisfy tribal fishing needs).

Petitioners assert that the Yurok Tribe does not have a ratified treaty with the United States as a purported basis for distinguishing *Adair* from the circumstances of the Yurok Tribe, whose Reservation was created by executive order. Pet. at 21, n.16. The Ninth Circuit in *Parravano* rejected that distinction in determining that the Yurok Tribe has a federally-reserved fishing right, and the same logic applies in the water rights context. It is the law of the Ninth Circuit that water rights established by executive order are entitled to the same legal protection as those rights established by treaty. 70 F.3d at 545. This Court has not distinguished between water rights established by executive order and those established by treaty. *See Arizona v. California*, 460 U.S. 605, 616 (1983) (rejecting Arizona's argument that "water rights could not be reserved by Executive Order"). Petitioners suggest no reason why this Court should do so for the first time in this case, much less without the benefit of briefing on a proper petition for writ of certiorari.

Petitioners' argument here rests largely on speculation about the effect of the court of appeals' decision on petitioners' asserted rights in other forums. Pet. at 22. The effect and interpretation of the decision are matters to be resolved at an appropriate time in an appropriate case. The fact that petitioners arguments have been rejected by the court of appeals and that the decision may adversely affect their rights are not sufficient reasons for this Court to exercise its supervisory power to correct departures from the "usual and accepted course of judicial proceedings."

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied and the request for an order vacating Section II.B.3 of the court of appeals' decision should be denied.

Respectfully submitted,

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